No. 4485

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

EZRA ALLEN,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Defendant in Error

Upon Writ of Error to the District Court of the United States for the District of Oregon.

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United States Attorney for the District of Oregon.

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STATEMENT OF FACTS.

Ezra Allen, Plaintiff in Error, hereinafter called the "defendant," was informed against for violation of Section 3, Title 2, of the National Prohibition Act.

The Information contains two counts. Count One charges the defendant with the unlawful possession of a quantity of intoxicating liquor and Count Two charges the defendant with the unlawful sale of a quantity of intoxicating liquor on the first day of September, 1924, at La Grande, Oregon. On November 22, 1924, after trial by jury, said defendant was found guilty on both counts. Thereafter the defendant was sentenced to a term of four months in the county jail of Multnomah County, Oregon. Defendant has sued out a Writ of Error and has alleged in support thereof in his Assignments of Error, that the Court erred in its refusal to give instructions requested by defendant relating to entrapment. Said instructions are as follows:

> "You are instructed that the defendant has set up as a defense to the commission of the crime charged, the fact that the officers who made the arrest were guilty of entrapment.

"The theory of the defense is based on Webster's definition of the verb "To Entrap," which is contained in these words 'to ensnare,' 'to entangle or take captive by trick or artifice; to take or catch in a trap as to entrap a bird.'

"You are instructed that as a matter of law, if you believe from the evidence that the defendant was entrapped into committing a crime which he would not have committed had there been no intrigue on the part of the officers, then and in that event you should find the defendant not guilty.

"The defendant has been charged with selling intoxicating liquor, to-wit: whiskey, contrary to the provisions of the Volstead Act. The defendant claims that he was entrapped into selling one bottle of whiskey through the instructions of prohibition agents, and that the whiskey would not have been sold at all if it had not been for the importunities and solicitations made by the officers and agents who went to La Grande in order to prosecute violators of the Federal Prohibition Law; and in this connection I charge you that if you be-

lieve from the evidence that the defendant was induced by the importunities of the prohibition agents to violate the law, and that through the instigation of either.................................. or .... or both of them, representing prohibition enforcement officers, the defendant, Erza Allen, was induced to sell them intoxicating liquors, and that he would otherwise not have violated the law, then you should return a verdict of not guilty, as it is the policy of the United States Courts not to uphold a conviction in any case where the offense was committed through the instigation of Government agents.

"If you find from the evidence that the officers accompanied by the defendant went to the place where it is claimed the liquor was sold, and thereafter importuned the defendant to sell them some intoxicating liquor, and induced him to sell such liquor, and that yielding to the importunities the defendant did procure for said officers, the intoxicating liquor testified to by the said officers, and you further believe that the defendant, without such solicitation and importunities, would not

have violated the law, then it is your duty to find the defendant not guilty for the reason heretofore stated, that the Federal Courts do not uphold conviction for offenses committed through instigation of Government agents.

"You are the sole and exclusive judges of the facts in this case, and whether or not there was an entrapment as claimed by the defendant, is a question of fact for you to determine. If he was entrapped, as before pointed out, then the law is that a verdict of not guilty should be returned."

It is further alleged by the defendant that the Court erred in refusing to give a requested instruction relating to agency, which instruction is as follows:

"Where one person procures or buys intoxicating liquor for another or assists him to buy or procure such liquor, he is not guilty of making a sale of such liquor, notwithstanding both the money and the liquor passed through his hands, provided he has no interest in the liquor or in the price and acts as the agent or intermediary of the buyer and not of the seller."

POINTS AND AUTHORITIES.

Requested instructions may be properly refused if there are no facts in the case to justify such instructions.

Coffin vs. United States, 162 U. S. 664, 672.

Condello vs. United States, 297 Fed. 200.

There is no evidence of entrapment where the testimony on the part of the Government simply tends to show sales of liquor and this testimony is controverted by the defense.

Johnston vs. United States, 1 F (2d) 928.

Bakotich vs. United States, CCA 9th Circuit (Not Yet Reported).

If intent and purpose to violate the law are present, the mere fact that public officers furnish the opportunity is no defense.

Ritter vs. United States, 293 Fed. 187, 189.

Billingsley vs. United States, 274 Fed. 86.

Farley vs. United States, 269 Fed. 721.

The refusal by the trial court to charge sound law requested by accused does not always constitute reversible error, since even in a criminal case error requiring reversal must be substantial and prejudice will not be presumed, if it is impossible to see that

the error could have wronged the party who complains of it or if accused is plainly guilty.

Tobias vs. United States, 2 F (2d) 361.
Simmons vs. United States, 300 Fed. 321.
Hobart vs. United States, 269 Fed. 784.
Kalmanson vs. United States, 287 Fed. 71.

One who tells a buyer he will obtain whiskey for him and who then purchases whiskey from seller with money given him by the buyer is guilty of selling whiskey in violation of the National Prohibition Act, since he acts as seller's agent, without whose aid and assistance the seller could not have made the sale.

Wigington vs. United States, 296 Fed. 125.

ARGUMENT.

The testimony on behalf of the Government shows that the defendant sold two pint bottles of whiskey to George Pierce on two different occasions on September 1, 1924. George Pierce was commissioned a Federal Prohibiton Agent on September 10, 1924, and at the time of the sale was expecting the arrival of said commission. The testimony further shows that Federal Prohibition Agent T. B. Buffington and George Pierce went to La Grande at the request of the police department and were informed by them

that the prohibition law was being violated at the Imperial Pool Hall or Billiard Parlor at La Grande. Accordingly Buffington equipped Pierce with marked money and instructed him to investigate the Imperial Pool Hall and ascertain who was violating the law at that place. Pierce went to the Imperial Pool Hall about 10:30 in the morning of September 1st and met Mark Patton an acquaintance in front of said pool hall. Pierce asked Patton where he could purchase liquor and was introduced to the defendant, Ezra Allen. Pierce then asked the defendant to sell him a bottle of whiskey and defendant agreed. Pierce went to the lavatory in the back of the Imperial Pool Hall; defendant followed a minute or so later, gave Pierce a pint bottle of whiskey and was paid $3.50 in marked money by Pierce. Pierce then left the pool hall, but could not locate Agent Buffington for some little time and it was then decided that another purchase should be made from the defendant. Buffington again gave Pierce $3.50 in marked money and in the afternoon of the same day, Pierce met defendant at the Imperial Pool Hall and again asked him for whiskey. Defendant asked him how many bottles he wanted and Pierce told him one. Defendant told Pierce to go to the back end of the pool hall and wait and that he, defendant,

would come back there. Pierce waited some fifteen or twenty minutes and defendant did not appear. Pierce then went to the front part of the pool hall where defendant was standing and the sale was made. Defendant pulled a pint bottle of moonshine whiskey out of his shirt, handed it to Pierce and Pierce gave him $3.50 in marked money for the bottle.

Defendant was then arrested and an additional pint bottle of whiskey taken from his possession. He was searched and 50c of the marked money which Pierce paid for the first bottle, and the $3.50 paid for the second bottle, were recovered from him.

The defendant denied selling Pierce the bottle of whiskey on the morning of September 1st; he admitted handing Pierce the bottle of whiskey in the afternoon and admitted receiving the $3.50 from Pierce, but nevertheless denied that he sold said bottle.

There is certainly no entrapment shown by the testimony adduced on behalf of the Government, either as to the sale of the first bottle or as to the second bottle. This testimony merely establishes the sale of intoxicating liquor. Defend-

ant denied the sale of the first bottle and no issue of entrapment could be raised by such denial as the only question was whether or not the bottle of whiskey had been sold by defendant to Pierce. There are, therefore, no facts relating to the sale of the first bottle to justify an instruction on the defense of entrapment.

The defendant's testimony in regard to the sale of the second bottle of whiskey to Pierce, so far as it might relate to entrapment is as follows:

"Q. Now, did he ask you to get him a bottle of whiskey?

A. Yes, sir.

Q. State the circumstances surrounding that.

A. He just kept after me, kept after me to go get a bottle; just kept it up all the time. 'Go get me a bottle, Go get me a bottle. I have a couple of women up in a room; they have got to have a drink.' I says, 'I haven't got nothing like that.' He says, 'Can't you get it?' I says, 'If there is anybody comes arond selling it, possibly I will see about it for you.' He came back three or four different times, kept on for me to get him a bottle. Finally I told him, 'If there is any one shows up that has one for you, I will get it for you.' Presently a fellow came in. He

says, 'Yes.' He had already given me $3.50. He came back there, give me the bottle. I handed it to Pierce.

Q. Did he give you the money before or after you gave him the whiskey?

A. He gave me the money before—a long time before then.

Q. How long?

A. Possibly half an hour.

Q. You procured the whiskey for him?

A. This boy handed it to me. I handed it right over to him—just the transaction, handed it to him."

The testimony shows that when Pierce first asked defendant to get him a bottle, defendant agree to "see about it" for him, and was willing to furnish him whiskey. Pierce did not induce, entice or trick the defendant into selling him this bottle of whiskey and apparently no persuasion was necessary. Certainly on this testimony it can not be said that the defendant would not have sold liquor if it had not been for the offer made by Mr. Pierce. It is quite apparent that defendant would have consented to "see about it" for any person whom he might deem it safe to deal with. Any person approaching the defendant and asking for a bottle of whiskey as Mr.

Pierce did in this case, would have been furnished with whiskey in the same manner that Pierce was. No entrapment is shown by this testimony, nor is there any entrapment shown by the testimony of the Government's witnesses.

It is further apparent from the defendant's testimony that he based his defense upon the theory that he did not sell the liquor to Pierce, hence he was not entitled to any instructions on entrapment.

In the case of Bakotich vs. United States, supra, Judge Hunt, speaking for the Circuit Court of Appeals, said:

> "If the testimony of the prosecution was accepted, as it was, what the officer did was merely to give defendant who was then under suspicion, an opportunity to make a sale of liquor—an opportunity, so the jury have found, availed of by defendant. Defendant offered no evidence of entrapment into making a sale. He denied that a sale was made and founded his defense upon the position that he made a gift to the man because he believed he was ill.
>
> "The real question, therefore, was whether

> there was a sale or a gift. Upon that point the Court very clearly instructed that the burden of proving a sale was upon the government. 'Of course,' said the Court, 'the government having alleged a sale, must prove a sale, and if the defendant gave the liquor to McGhee without a consideration the count is not proven; but the question here is for you to determine as between these two men which one is telling the truth. Is McGhee telling the truth when he says he paid fifty cents for the liquor, or is the defendant telling the truth when he says he gave the liquor to McGhee?' We can not see how defendant was prejudiced by the refusal of the Court to give the instructions requested."

Assuming for the purposes of argument that there was an issue of entrapment in regard to the sale of the second bottle of whiskey which should have gone to the jury, the refusal of the court to instruct the jury is not reversible error. The defendant was found guilty by the jury of selling whiskey on September 1st. Three bottles of whiskey were introduced in evidence; the first, accord-

ing to the Government's testimony, was sold by defendant to Pierce in the morning of September 1st; the second sold by defendant to Pierce on the afternoon of the same day; and the third taken from defendant's possession at the time of his arrest. Defendant denied the sale of the first bottle and the possession of the third bottle. The issue raised thereby was whether or not defendant sold the first bottle to Pierce and whether or not he possessed the third bottle. On the question as to what constitutes a sale the Court instructed the jury as follows:

> "The second count in the information is simply, that the defendant sold this liquor; and a sale is simlpy a transfer, for a consideration, by one person to another, of the title of the property. And title of personal property is usually passed by passing the property itself from one to another—the possession. That is the sole question to be determined by you on the second count in the information, to-wit: whether or not the defendant in this case did sell one or two of these bottles of liquor that have been introduced in evidence, to the prohibition officer or to Mr. Pierce, who testified in the case before you, and whether

> he then delivered the property over to Mr. Pierce, and whether he took from Mr. Pierce a consideration therefor. If he did—if all these things have been proven—then the second count in the information would have been established."

This instruction correctly states the law and puts the issues involved in the sale of the first bottle squarely before the jury. The verdict and judgment are, therefore, upheld by the evidence relating to the sale of the first bottle of whiskey to Pierce and the instructions of the Court which properly placed the issues involved before the Jury. The second bottle of whiskey and the evidence relating to its sale to Pierce can be disregarded or taken out of the case entirely and the defendant would not be prejudiced thereby. Certainly this Court will not say as a matter of fact, that the jury found the defendant guilty of selling the second bottle of whiskey to Pierce and not guilty of selling the first bottle. If there was any error committed by the Court in failing to instruct in any matter connected with the sale of the second bottle, such error would not prejudice the defendant and prejudice will not be presumed even in a criminal case, if it is impossible

to see that the error could have injured the party who complains of it.

Again assuming that there was evidence of entrapment in the sale of the second bottle, the instructions requested by the defendant on entrapment are too broad as they relate to the sale of both bottles. Furthermore it is apparent that if the defendant did sell the bottle of whiskey to Pierce in the morning of September 1st, then there would be no entrapment as to a second sale on the same day. Fisk vs. United States, 279 Fed. 12, 15. Defendant's requested instructions did not take this into consideration.

The instruction requested by defendant relating to agency, is not sound law as it is apparent that any one who aids and assists a seller of intoxicating liquor is equally guilty with the seller. This comes within the rule laid down in the case of Wigington vs. United States, supra, and the facts in that case are very similar to the testimony given by defendant in this case. The Court in that case held that a person who purchases whiskey from the seller, with money given him by the buyer, is guilty of selling whiskey since he acts as seller's agent without whose aid and assistance the seller could not

have made the sale.

This requested instruction is based on the theory that the defendant did not sell liquor to Pierce. The Court fully instructed the Jury as to what constituted a sale and the defendant in any event is not prejudiced by the Court's failing to give the instruction requested. This requested instruction is inconsistent in theory with the requested instructions on entrapment and defendant should not now be heard to complain because the Court did not follow the theory of both instructions.

Respectfully submitted.

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